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TEXAS DEPARTMENT OF AGRICULTURE  
Opinion Committee

RICK PERRY  
Commissioner

July 16, 1992

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JUL 17 1992

Opinion Committee

The Honorable Dan Morales  
Attorney General  
State of Texas  
The Price Daniel Building  
P.O. Box 12548  
Austin, Texas 78711

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RQ

Re: Request for Opinion Concerning the Constitutionality of Assessments Collected Under HB 1979, Which Establishes a Statewide Coordinated Plan to Eradicate the Boll Weevil In Texas

Dear General Morales:

On November 14, 1991, Senator Steve Carriker submitted to you a request for review of an "informational sheet" that he intended to circulate to his constituents regarding the constitutionality of HB 1979. This bill was proposed during the 72nd Regular Session for the purpose of implementing a statewide plan to eradicate the boll weevil in Texas. According to his request, the Senator's research indicated that a constitutional amendment would be required before a program similar to that proposed in HB 1979 could be enacted. Senator Carriker also requested that you provide him with an informal letter opinion.

On June 2, 1992, an advisory letter was issued from your office in which you stated that you believe the Senator's conclusion regarding the need for a constitutional amendment to implement HB 1979 or a similar plan is correct. Because of the importance of this legislation to my constituents, and our belief that the enactment of HB 1979 or similar legislation is crucial to the continued success of the cotton industry in Texas, I hereby request that you issue a formal opinion regarding the issue of whether the type of assessment contemplated by HB 1979 would be considered an "occupational tax on agricultural pursuits" in violation of Article VIII, Section 1 of the Texas Constitution.

In support of his position, Senator Carriker cites the case of Conlen Grain and Mercantile, Inc. v. Texas Grain Sorghum Producers Board, 519 S.W.2d 620 (Tex. 1975). That case involved commodity producer boards established under Chapter 41 of the Texas Agriculture Code and the issue of whether refundable assessments collected from producers by those boards were an occupational tax on agricultural pursuits and thereby prohibited by the Texas Constitution. The Court held that the type of assessments collected by Chapter 41 commodity boards were unconstitutional, and the Constitution was amended by Article XVI, § 68 in 1983 to allow Chapter 41 boards to continue to collect their refundable

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assessments to fund programs of marketing, research, promotion and education relating to a specific commodity.

While there are some similarities between the Chapter 41 boards in Conlen and the Foundation board contemplated to be established under HB 1979, we believe that there are significant differences which distinguish the two in regard to the purpose of the boards, type of activities conducted by each and the purpose of the assessments. It is also our belief that the differences are enough to make the enactment of HB 1979 compatible with Conlen, without the need for a constitutional amendment.

Specifically, the Court in Conlen distinguished between the type of assessment that has as its primary purpose the objective of raising revenue for a public or general purpose, and the type of assessment that is connected to a regulatory scheme and/or has as its primary purpose the raising of revenues in an amount needed to provide a specific regulatory function. The Court found that an assessment having a primary purpose of raising revenue for a public purpose was a tax, while the latter was not. In addition, the Court distinguished between a tax as described above and an assessment that can be tied to a specific benefit to the persons being assessed, which the Court considered to be a "special assessment" and not an "occupational tax". These distinctions have also been made in case law since the issuance of the Conlen decision.

Chapter 41 boards are established in the same manner and for the same purposes as they were at the time of the Conlen decision. Basically, Chapter 41 authorizes a nonprofit organization representing producers of a particular agricultural commodity to petition the Commissioner of Agriculture to be certified to conduct a referendum to determine whether producers of that commodity will assess themselves for the purposes of developing, carrying out, and participating in programs of research, disease and insect control, predator control, education, and promotion, designed to encourage the production, marketing, and use of the commodity upon which the assessment is levied.

At the time the referendum election is held, a board is also elected to administer funds collected in accordance with the purposes stated above. A board is established on a regional or statewide basis; and, generally speaking, funds are collected on a refundable basis and are used for promotional and marketing activities. Activities are such that they benefit producers of the commodities as a whole, and in that sense, the assessment is for the purpose of raising revenue to benefit producers as a whole rather than individually. In addition, there are no regulatory

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functions connected with the establishment of such boards. That is, they have no authority to regulate and/or participate in the regulation of the industry that the commodity board represents.

The Foundation board to be established in HB 1979, while it begins in the same manner as a Chapter 41 board, with a petition to the Commissioner for authorization to conduct a referendum among producers, is very different in its purpose and authority. The Foundation, upon certification by the Commissioner, will, as its only purpose, assess cotton producers to fund a comprehensive state-wide boll weevil eradication program. The program will be implemented by a producer-elected board of directors, in cooperation with the Texas Department of Agriculture and other governmental entities.

To accomplish this, the board will establish "eradication zones" beginning in the southernmost part of the state and ultimately ending in the northernmost part of the state. One zone will be established at a time. As each zone is established, and a referendum held, any assessments collected from cotton producers in that zone will be used solely to develop and implement an eradication program in that zone. The board will determine the maximum assessment to be collected and the basis for collection, i.e., on a per pound or per acre basis. An eradication program would include scouting, trapping, and spraying of infested cotton fields in the zone to eradicate the boll weevil. As the boll weevil is controlled in a zone, funds will be used for maintaining a low boll weevil population in that zone.

In addition to the authority to implement a program to directly benefit cotton producers in a zone, the Foundation, together with the Texas Department of Agriculture, will develop regulations for planting and destroying cotton plants in a zone and for quarantining areas as needed. The Foundation will also participate in the enforcement of regulations established together with the Texas Department of Agriculture, including the use of penalties provided in HB 1979.

In closing, I believe that there are substantial enough differences between the type of board contemplated by HB 1979 and the commodity producer boards which were the subject of the Conlen decision to explore further whether the collection of a producer assessment by the HB 1979 Foundation board would require the passage of a constitutional amendment. I know that this is a complicated issue, and your further assistance in clarifying this matter will be greatly appreciated. I have attached a copy of HB 1979 for your information.

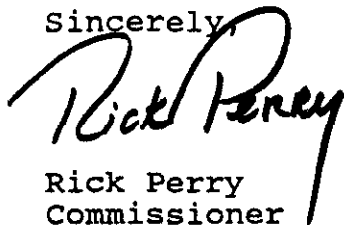
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It is therefore requested that an opinion be issued addressing the following concern:

Whether a producer assessment collected by a board established under HB 1979 or similar legislation would be considered an "occupational tax on agricultural pursuits" in violation of Article VIII, Section 1 of the Texas Constitution, requiring the passage of a constitutional amendment to implement.

I look forward to your prompt response.

Sincerely,

A handwritten signature in black ink that reads "Rick Perry". The signature is stylized with a large, looping "R" and a cursive "Perry".

Rick Perry  
Commissioner

RP/GSC/DAH/dh

ENROLLED

AN ACT

relating to providing for methods and procedures for the eradication of boll weevils in cotton; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 74, Agriculture Code, is amended by adding Subchapter D to read as follows:

SUBCHAPTER D. OFFICIAL COTTON GROWERS' BOLL WEEVIL

ERADICATION FOUNDATION

Sec. 74.101. DEFINITIONS. in this subchapter:

(1) "Board" means the board of directors of the official cotton growers' boll weevil eradication foundation.

(2) "Boll weevil" has the meaning assigned by Section 74.002 of this code .

(3) "Certificate" means a document issued or authorized by the department indicating a regulated article is not contaminated with the boll weevil.

(4) "Cotton" means a (cotton plant or any part of it including bolls, stalk, flowers, root, or leaves or cotton products such as seed cotton, cottonseed, and hulls.

(5) "Cotton grower" means any person who is engaged in or who has an economic interest in the business of producing cotton.

(6) "Foundation" means the official cotton growers' boll weevil eradication foundation.

1           (7) "Host" means any plant or plant product in which  
2 the boll weevil is capable of completing any portion of its life  
3 cycle.

4           (8) "Infested" means the presence of the boll weevil  
5 in any life stage or the existence of circumstances that make it  
6 reasonable to believe that the boll weevil is present.

7           (9) "Permit" means a document issued or authorized by  
8 the department to provide for the movement of regulated articles to  
9 restricted designations for limited handling, use, or processing.

10           (10) "Regulated article" means any article carrying or  
11 capable of carrying the boll weevil, including but not limited to  
12 cotton plants, seed cotton, gin trash, other hosts, or mechanical  
13 cotton pickers.

14           Sec. 74.102. CERTIFICATION BY COMMISSIONER; REQUIREMENTS.

15           (a) Any nonprofit organization authorized under the laws of this  
16 state representing cotton growers may petition the commissioner for  
17 certification as the organization authorized to conduct a  
18 referendum for the creation of the foundation and the initial  
19 election of an official cotton growers' boll weevil eradication  
20 foundation board.

21           (b) If the referendum and election are to be conducted in a  
22 limited area of the state, the petition must describe the  
23 boundaries of the area to be included.

24           (c) The petition must propose a six-member, nine-member,  
25 12-member, or 15-member board with a district representation plan.

26           (d) Not later than the 30th day after the date on which a  
27 petition for certification is received, the commissioner shall hold

1 a public hearing to consider the petition.

2 (e) If the commissioner determines that, on the basis of  
3 testimony presented at the public hearing, the petitioning  
4 organization is representative of the cotton growers within the  
5 boundaries described in the petition and that the petition conforms  
6 to the purposes and provisions of this subchapter, the commissioner  
7 shall certify that the organization is representative of the cotton  
8 growers within the described area and is authorized to conduct the  
9 initial referendum for the creation of the foundation and election  
10 of the initial foundation board and is authorized to conduct  
11 referenda as provided by Sections 74.105 and 74.107 of this code.

12 (f) The board shall ask the commissioner for authority to  
13 conduct a maximum assessment referendum in each eradication zone  
14 described in the petition. Only cotton growers in areas that are  
15 activated for the eradication program are required to pay the  
16 assessment. A cotton grower must have production in the  
17 eradication zone to vote in the assessment referendum.

18 (g) The board may form an advisory committee composed of  
19 representatives from this state, other states, or other countries.  
20 The board may change membership on the committee from time to time  
21 as necessary.

22 Sec. 74.103. DUTIES AND RESPONSIBILITIES OF BOARD. (a) The  
23 foundation shall make available for inspection or audit by the  
24 commissioner at any reasonable time all books and records of  
25 account and minutes of proceedings maintained by the foundation.  
26 Not later than the 45th day after the last day of the fiscal year,  
27 the foundation shall submit to the commissioner a report itemizing

1 all income and expenditures and describing all activities of the  
2 foundation during the fiscal year.

3 (b) The foundation shall provide surety bonds in amounts  
4 determined by the commissioner for employees or agents who handle  
5 funds for the foundation.

6 (c) The members, officers, and employees of the foundation  
7 are not individually responsible to any cotton grower or other  
8 person for errors in judgment, mistakes, or other acts of omission  
9 or commission other than individual criminal actions or acts of  
10 dishonesty. A member, officer, or employee is not individually  
11 responsible for any act or omission of any other member of the  
12 foundation. If liable, members of the foundation are severally  
13 liable and not jointly liable, and a member is not liable for the  
14 default of any other member.

15 (d) The foundation shall receive, collect, hold in trust,  
16 and disburse all assessments and other funds collected under this  
17 subchapter as trust funds of the foundation. Funds collected by  
18 the foundation are not required to be deposited in the state  
19 treasury and are not subject to appropriation. The foundation  
20 shall deposit all money collected under this subchapter in a bank  
21 or other depository approved by the board. On discontinuation of a  
22 program, the commissioner shall pay from the remaining funds of the  
23 foundation the existing obligations of the foundation. The  
24 foundation shall pay to the contributing growers on a pro rata  
25 per-unit basis any funds remaining in excess of those required for  
26 completing the business of the foundation.

27 (e) Members of the board serve without compensation but are



1 entitled to reimbursement for reasonable and necessary expenses  
2 incurred in the discharge of their duties.

3 Sec. 74.104. CERTIFICATION; REVOCATION. (a) If the  
4 commissioner determines that a foundation meets the requirements of  
5 this subchapter and that the board members have been properly  
6 elected, the commissioner shall certify the foundation as the  
7 official cotton growers' boll weevil eradication foundation. A  
8 certification is valid for the purposes of this subchapter only and  
9 does not affect other organizations or associations of cotton  
10 growers established for other purposes.

11 (b) The commissioner shall certify only one foundation. The  
12 commissioner may revoke the certification of the foundation if at  
13 any time the foundation fails to meet the requirements of this  
14 subchapter.

15 Sec. 74.105. REFERENDUM; ASSESSMENTS. (a) The foundation  
16 shall determine the assessment to be levied on each eradication  
17 zone as provided by Section 74.113 of this code. The foundation  
18 shall determine the amount of the assessment, the period that the  
19 levy should exist, and the geographic area to be covered by the  
20 assessment.

21 (b) Each affected cotton grower is entitled to vote in any  
22 assessment referendum and to elect members of the board. The  
23 foundation, with commission approval, shall determine any questions  
24 of eligibility to vote.

25 (c) The balloting in the referendum shall be conducted in  
26 person on a date determined by the commissioner, in at least one  
27 location centrally located within each county of the affected

1 region. The physical balloting place shall be staffed by an  
2 official of the foundation and a representative of the secretary of  
3 state, at a location or locations to be assigned by a majority vote  
4 of the county commissioners court in the affected counties. For  
5 purposes of protecting the integrity of the referendum, producers  
6 shall present, prior to casting their ballot in the assessment,  
7 documents certifying the extent of their production within the  
8 affected region. For producers participating in the Agriculture  
9 Stabilization and Conservation Service (A.S.C.S.) program, those  
10 documents shall be evidence of participation in signup for the  
11 federal cotton program of the most recent crop year. For producers  
12 not participating in the federal A.S.C.S. program, the commissioner  
13 shall promulgate rules for the verification of producers acreage.  
14 The referendum will be considered valid if over 50 percent of the  
15 producers affected cast ballots in favor of the referendum.

16 (d) Assessments collected by the foundation under this  
17 subchapter are not state funds.

18 Sec. 74.106. CONDUCT OF REFERENDUM. The foundation shall  
19 arrange for and manage any referendum or board election held under  
20 this subchapter. The foundation shall bear all expenses incurred  
21 in conducting a referendum or board election. The commissioner  
22 shall adopt rules necessary to conduct a referendum or board  
23 election.

24 Sec. 74.107. SUBSEQUENT REFERENDA AND BOARD ELECTIONS. (a)  
25 If a referendum conducted under this subchapter fails to receive  
26 the required number of affirmative votes, the petitioning certified  
27 organization may, with the consent of the commissioner, call other

1 referenda.

2 (b) The foundation shall conduct elections for the purpose  
3 of electing members to the board. The board shall give proper  
4 notice.

5 (c) A cotton grower who is eligible to vote in a referendum  
6 or election as provided by this subchapter is eligible to be a  
7 member of or a candidate for membership on the board.

8 (d) A candidate must file an application with the certified  
9 organization in order to have the candidate's name placed on the  
10 ballot. The application must be signed by the candidate and by 10  
11 or more cotton growers who are eligible to vote at the election.  
12 The candidate must file the application not later than the 30th day  
13 before the date set for the election

14 (e) A voter may vote for an eligible person whose name does  
15 not appear on the official ballot by writing in the eligible  
16 person's name on the ballot.

17 Sec. 74.108. FAILURE TO PAY ASSESSMENTS. (a) A cotton  
18 grower who fails to pay, when due and after reasonable notice, any  
19 assessment levied under this subchapter is subject to a per-unit  
20 penalty, as set by the foundation.

21 (b) A cotton grower who fails to pay all assessments and  
22 penalties before the 31st day after receiving notice of the  
23 delinquency shall destroy any cotton growing on the grower's  
24 acreage that is subject to the assessment. If the grower fails to  
25 destroy the cotton, the department shall, on a recommendation of  
26 the foundation, subject the crop of the grower to an aerial  
27 application designed to eradicate boll weevil infestation. The

1 grower shall be assessed the cost of this application. Injunctive  
2 relief available to the department under this subchapter is in  
3 addition to any other legal remedy available to the department.  
4 The department is not required to file a bond in a proceeding under  
5 this subsection.

6 (c) In addition to any other remedies for the collection of  
7 assessments and penalties, the department may place and perfect a  
8 lien on cotton produced and harvested before the destruction of  
9 other cotton grown from the acreage that is subject to the  
10 assessment that is due and unpaid. A buyer of cotton takes free of  
11 the lien if the buyer has not received written or actual notice of  
12 the lien from the department or if the buyer has paid for the  
13 cotton by a check on which the department is named as a joint  
14 payee. In an action to enforce the lien, the burden is on the  
15 department to prove that the buyer of cotton received written or  
16 actual notice of the lien. A buyer of cotton other than a person  
17 buying cotton from the cotton grower takes free of the lien.

18 Sec. 74.109. COOPERATIVE PROGRAMS AUTHORIZED. The  
19 commissioner shall carry out programs to destroy and eliminate the  
20 boll weevil in this state. The commissioner and the foundation are  
21 authorized to cooperate through written agreements with any agency  
22 of the federal government, any state agency, any appropriate agency  
23 of a foreign country contiguous to the affected area, any person  
24 who is engaged in growing, processing, marketing, or handling  
25 cotton, or any group of persons in this state involved in programs  
26 similarly established to carry out the purposes of this subchapter.  
27 Agreements entered into under this section may provide for cost

1 sharing and for division of duties and responsibilities under this  
2 subchapter and may include other provisions to carry out the  
3 purposes of this subchapter.

4 Sec. 74.110. ENTRY OF PREMISES; ERADICATION ACTIVITIES;  
5 INSPECTIONS. The department or its designated representative may  
6 enter cotton fields or other premises to carry out the purposes of  
7 this subchapter, which include the treatment, monitoring, and  
8 destruction of growing cotton or other host plants. The department  
9 may inspect fields or premises in this state for the purpose of  
10 determining whether the property is infested with the boll weevil.  
11 An inspection must be conducted during reasonable daylight hours.

12 Sec. 74.111. REPORTS. Each person growing cotton in this  
13 state shall furnish to the foundation on forms supplied by the  
14 foundation information that the foundation requires concerning the  
15 size and location of all commercial cotton fields and of  
16 noncommercial patches of cotton grown as ornamentals or for other  
17 purposes.

18 Sec. 74.112. QUARANTINE. The department may adopt rules  
19 relating to quarantining areas of this state that are infected with  
20 the boll weevil. The rules shall address the storage of regulated  
21 articles and the movement of regulated articles into and out of a  
22 quarantined area. The department may also adopt rules governing  
23 the movement of regulated articles from other states into this  
24 state if the articles are known to be infested with the boll  
25 weevil.

26 Sec. 74.113. AUTHORITY TO DESIGNATE ERADICATION ZONES,  
27 PROHIBIT PLANTING OF COTTON, AND REQUIRE PARTICIPATION IN

1 ERADICATION PROGRAM. The commissioner, with the advice of the  
2 foundation, may designate by regulation one or more areas of this  
3 state as an eradication zone in which boll weevil eradication  
4 programs may be undertaken and assessments collected if referenda  
5 are passed in accordance with this subchapter. The commissioner  
6 may adopt reasonable rules regarding areas where cotton may not be  
7 planted in an eradication zone if there is reason to believe  
8 planting will jeopardize the success of the program or present a  
9 hazard to public health or safety. The commissioner may adopt  
10 rules prohibiting the planting of noncommercial cotton in  
11 eradication zones, as described in this subchapter, and requiring  
12 that all growers of commercial cotton in an eradication zone  
13 participate in a boll weevil eradication program that includes cost  
14 sharing as required by the rules. Notice of prohibitions and  
15 requirements shall be given by publication for one day each week  
16 for three successive weeks in a newspaper having general  
17 circulation in the affected area. The commissioner may adopt a  
18 reasonable schedule of penalty fees to be assessed on growers in a  
19 designated eradication zone who do not meet the requirements of the  
20 rules issued by the commissioner relating to reporting of acreage  
21 and participation in cost sharing. The penalty fees adopted may  
22 not exceed \$50 per acre. If a grower fails to meet the  
23 requirements of rules adopted by the commissioner, the commissioner  
24 may order the destruction of cotton not in compliance with the  
25 rules. Costs incurred by the commissioner in the destruction of  
26 cotton may be assessed against the grower.

27 Sec. 74.114. AUTHORITY FOR DESTRUCTION OR TREATMENT OF

1 COTTON IN ERADICATION ZONES; COMPENSATION PAYABLE. The department  
2 may destroy or treat volunteer or other noncommercial cotton and  
3 establish procedures for the purchase and destruction of commercial  
4 cotton in eradication zones if the department determines the action  
5 is necessary to carry out the purposes of this subchapter. The  
6 department is not liable to the owner or lessee for the destruction  
7 or injury of any cotton that was planted in an eradication zone  
8 after publication of notice as provided by this subchapter. The  
9 foundation is liable for the destruction of cotton if the cotton  
10 was planted in an eradication zone before publication of the  
11 notice.

12 Sec. 74.115. AUTHORITY TO ADOPT RULES. (a) The  
13 commissioner may adopt rules restricting the pasturage of livestock  
14 or location of honeybee colonies on any premises in an eradication  
15 zone that has been or is being treated to eradicate the boll  
16 weevil.

17 (b) The commissioner and certified growers' organizations  
18 may adopt other rules deemed necessary to carry out the purposes of  
19 this subchapter and Subchapter A of this chapter. All rules issued  
20 under this subchapter must be adopted and published in accordance  
21 with state requirements.

22 Sec. 74.116. PENALTIES. (a) A person who violates this  
23 subchapter or rules adopted under this subchapter or who alters,  
24 forges, counterfeits, or uses without authority a certificate,  
25 permit, or other document issued under the authority of this  
26 subchapter or rules adopted under this subchapter commits an  
27 offense.

1       (b) A person who in violation of the rules of the  
2       commissioner moves a regulated article that is infected by the boll  
3       weevil into this state from any other state commits an offense.

4       (c) An offense under this section is a Class C misdemeanor.

5       Sec. 74.117. SUNSET PROVISION. The board is subject to  
6       Chapter 325, Government Code (Texas Sunset Act). Unless continued  
7       in existence as provided by that chapter, the board is abolished  
8       and this subchapter expires September 1, 2003.

9       SECTION 2. This Act takes effect September 1, 1991, except  
10      that the Department of Agriculture may not destroy or treat cotton  
11      as permitted by Section 74.114, Agriculture Code, as added by this  
12      Act, before September 1, 1993.

13      SECTION 3. The importance of this legislation and the  
14      crowded condition of the calendar, in both houses create an  
15      emergency and an imperative public necessity that the  
16      constitutional rule requiring bills to be read on three several  
17      days in each house be suspended, and this rule is hereby suspended.

18      \_\_\_\_\_  
19      President of the Senate

\_\_\_\_\_  
Speaker of the House

20      I certify that H.B. No. 1979 was passed by the House on May  
21      1991, by a non-record vote; and that the House concurred in  
22      Senate amendments to H.B. No. 1979 on May 22, 1991, by a non-record  
23      vote.

24      \_\_\_\_\_  
25      Chief Clerk of the House

26      I certify that H.B. No. 1979 was passed by the Senate, with  
27      amendments, on May 19, 1991, by a viva-voce vote.



\_\_\_\_\_  
Secretary of the Senate

APPROVED: \_\_\_\_\_

Date

\_\_\_\_\_  
Governor